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No. 82-29
IN THE

Supreme Court of the United States

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

vs.

HORACIO RAMOS MIRANDA,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI.

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Question Presented.

Whether the unreasonable and unexplained failure by the Immigration and Naturalization Service to adjudicate a visa petition, properly filed in behalf of an alien, thereby causing the alien to become statutorily ineligible for the status petitioned for, constitutes affirmative misconduct for which the Immigration and Naturalization Service may be estopped from denying the alien permanent resident status based on the classification to which he was originally entitled.

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Jurisdiction.

Respondent agrees with petitioner's statement of jurisdiction.

Statutes and Regulations Involved.

Respondent agrees with petitioner's statement of Statutes and Regulations involved as set forth and adds thereto:

8 C.F.R. 245.2(a)(4) provides in pertinent part:

> The applicant shall be notified of the decision and, if the application is denied, of the reasons therefor. Except as otherwise provided in this subparagraph, no appeal shall lie from the denial of an application by the district director but such denial shall be without prejudice to the alien's right to renew his application in proceedings under Part 242 of this chapter, * * * *.

Statement.

1. Respondent Horacio Ramos Miranda, a 50-year old native and citizen of the Philippines, entered the United States on July 23, 1971, as a visitor for pleasure with authority to remain until December 1, 1971 (R. 58).[1] On May 26, 1976, Respondent married Linda Milligan, a United States citizen (R. 73). Linda Milligan signed a visa petition on behalf of respondent, her husband, and requested that he be classified as the Immediate Relative of a United States citizen for issuance of an immigrant visa (R. 76, 76-A). See 8 U.S.C. 1151(a) and (b). The visa petition which (if approved) would qualify respondent as a person to whom "an immigrant visa is immediately available * * *" (8 U.S.C. 1255(a)(3)), together with respondent's application for adjustment of status to that of permanent resident alien, were filed with the Immigration and Naturalization Service on June 10, 1976 (R. 66, 66-B, 76).

2. On December 5, 1977, approximately eighteen months later, prior to adjudication of the visa petition by I.N.S., respondent's wife withdrew said petition. (R. 75). On the same day, December 5, 1977, and NOT December 14, 1977[2] the Service denied respondent's application for adjustment of status to that of permanent resident, on the

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[1] "R" refers to the certified administration record in the Court of Appeals, a copy of which has been lodged with the Clerk of the Court.

[2] The certified administrative record at R-77 does not reflect the true date that the decision on respondent's application for status as permanent resident was rendered by the District Director. The decision was actually rendered December 5, 1977; however, the original date was obliterated and replaced at the upper and lower right side of the document with a handwritten date of December 14, 1977. This is the date (December 14, 1977) respondent was arrested and taken into custody by the Service and the date he was first served notice of the decision. A full statement of this discrepancy appears in respondent's "Petitioner's Reply Brief" to the United States Court of Appeals for the Ninth Circuit at pages 2, 3. This discrepancy has yet to be explained or rebutted by the Service. (See Appendix attached hereto.)

basis that an immigrant visa was not "immediately available" to him (R. 77, 78).

3. Within 48 hours, on December 7, 1977, the Service issued a warrant for the arrest of the respondent, issued an order to show cause why respondent should not be deported as an "overstayed" visitor, and scheduled a deportation hearing to commence on December 22, 1977 (R. 79, 79-A). See U.S.C. 1251(a)(2). On December 14, 1977, Mr. Miranda was arrested by a Service officer, taken into custody and released under bond in the amount of $3,000.00 (R. 79, 79-A). It was at this time Mr. Miranda was first informed that the visa petition had been withdrawn and that his application for permanent resident status had been denied by the District Director (R. 77, 78, 79, 79-A).

4. At deportation hearings conducted in March 1978 (R. 20-38), respondent admitted he was an "overstayed" visitor, and on that basis alone he would be deportable; however, during the course of the hearings he renewed his application for permanent resident status pursuant to 8 CFR 245.2(a)(4), based on his marriage to Milligan (R. 27-29). Counsel for the respondent attempted to submit evidence relating to the bona fides of respondent's marriage, including the date of the break up of the marriage, and the date respondent was first advised of the denial of his application for permanent resident status (R. 29-31). The Service objected to the introduction of such evidence as being irrelevant (R. 30).

The immigration judge sustained the Service's objection, ruling that such evidence was irrelevant and precluded counsel from pursuing the introduction of evidence on these issues (R. 31). The Service offered neither argument nor evidence that respondent's marriage to Milligan was sham or fraudulent in any manner.

Respondent requested, in the alternative to deportation, that he be granted voluntary departure (R. 27, 32-38). In his application for voluntary departure, respondent volunteered that he had, in the Municipal Court of the State of California, North Orange County Judicial District, entered a plea of guilty to the violation of Section 502.7(b)(1) of the California Penal Code (R. 62-64). Respondent was thereupon convicted of a misdemeanor which would be classifiable as a petty offense. Respondent made full restitution to the Pacific Telephone Company; completed his period of summary probation; and pursuant to California Penal Code Section 1203.4, withdrew his guilty plea, and the conviction was dismissed on March 31, 1978 (R. 65).

5. The immigration judge denied Respondent's application for adjustment of status to permanent resident since he was not the beneficiary of a visa petition approved by the District Director (R. 58). The immigration judge also denied respondent's request for voluntary departure "as a matter of administrative discretion" (R. 60).

6. On appeal to the Board of Immigration Appeals, Respondent once again pursued his argument as to the bona fides of his marriage (R. 43), and the oppressive and unjustifiable delay of the Service in failing to adjudicate the visa petition and application for permanent resident status (R. 42-45). The respondent had been foreclosed from presenting these arguments in the deportation hearing, but there was no such foreclosure in this forum and Respondent's arguments were permitted to be advanced (R. 29-31).

The Service improperly argued that respondent had raised his estoppel claim in an improper forum asserting respondent was challenging a denial of the visa petition (R. 11). Respondent was in the proper forum because the visa petition has never been denied. It had never been acted upon by the District Director. The visa petition was withdrawn

prior to adjudication by INS (R. 75). Respondent raised the issue that the Service should be estopped from denying his application for adjustment of status to that of a permanent resident (R. 42-45).

The Service, for the first time, asserted the eighteen month delay in acting upon the pending visa petition was an excusable "investigative delay" and accused respondent of not having resided in a "bona fide marital union" for the full eighteen month period (R. 13). However, the Service did not offer one scintilla of evidence in support of its assertions, or even to show that an investigation had in fact ever been conducted; that there was fraud in the inception of respondent's marriage; that respondent's marriage was a sham; or that respondent did not reside in a "bona fide marital union" with his wife.

In response to these unsupported assertions and unsubstantiated accusations, which had not previously been made a part of the record, the Respondent in his reply brief to the Board of Immigration Appeals requested that the Board not give consideration to the Service's *out of record* statements.

The Board affirmed the decision of the immigration judge (R. 4). Further, the Board addressed the issue of Equitable Estoppel and questioned whether it would have the authority to grant such relief (R. 4). The Board then proceeded to find no evidence of "affirmative misconduct" on the part of the Service as respondent's wife had withdrawn the visa petition.

Additionally, the Board affirmed the immigration judge's decision as to the denial of respondent's application for voluntary departure.

7. Respondent appealed the Board's decision to the Court of Appeals and argued that the Service should be equitably estopped from denying his application for ad-

justment of status to that of a permanent resident. Respondent asserted the Immigration and Naturalization Service has a duty to adjudicate applications in a timely manner. The Court was informed that the Service's policy at one time had been to schedule a combined hearing to adjudicate a visa petition and an application for adjustment of status within three months of receipt by the Service.

Respondent asserted that the Service had intentionally delayed acting upon the visa petition and respondent's application for adjustment of status in order to test the "bona fides" of respondent's marriage to Linda Milligan. It was not until a drastic change had occurred in respondent's circumstances, some one and one-half years after the filing of the visa petition and application for adjustment of status; to wit, the breakup of respondent's marriage, that the Service acted. Within forty-eight hours the Service (1) denied the application for adjustment of status; (2) issued a warrant for the arrest of respondent; (3) issued an order to show cause why respondent should not be deported; (4) scheduled a deportation hearing; and (5) in seven days had arrested and taken the respondent into custody.

Respondent contended the eighteen month delay was unjustifiable and oppressive. Respondent argued that the Service's intentional failure to act without just cause when the Service was under a duty to act in a timely manner constituted affirmative misconduct and that equitable estoppel should be invoked against the Service. Had the Service complied with its duty to adjudicate applications in a timely manner, Respondent's application would have been acted upon while his marriage was intact and he would have received permanent resident status.

In spite of the Service's assertion to the Board of Immigration Appeals that it could establish that the "investigative delay" (R. 13) was excusable, the Service offered

no evidence to the Court that any type of investigation had been conducted or that there was a question as to the "bona fides" of respondent's marriage which would justify the eighteen month delay.

The Court of Appeals held that the Service had engaged in affirmative misconduct and remanded the case for consideration of respondent's application for permanent residence at the time the Service should have acted, with the requirement that the Service, in considering the adjustment application had to treat the visa petition as if it were approved.

8. On December 12, 1980, the Immigration and Naturalization Service petitioned the Court of Appeals for rehearing and suggestion for rehearing *en banc*. On March 14, 1981, the Court of Appeals denied the petition for rehearing and the suggestion for rehearing *en banc* was rejected.

9. This Court granted the government's petition for a writ of certiorari, vacated the judgment of the court of appeals and remanded the case for reconsideration in light of *Schweiker v. Hansen*, 450 U.S. 785 (1981), 454 U.S. 808 (1981). On remand, the court of appeals adhered to its original decision, reiterating the finding on which that decision had rested: "[T]he unexplained failure of the INS to act on the visa petition for an eighteen-month period (after which Miranda's marriage broke up and the former Mrs. Miranda withdrew her visa petition) constitutes affirmative misconduct by the INS". The court distinguished *Hansen* on two grounds. First, respondent was seeking only "to be allowed to become a permanent resident, which entails no direct burden on public funds". Second, "the official misconduct [in *Hansen*] had not caused respondent to act or fail to act in a manner 'that [she] could not correct at any time.' 450 U.S. at 789 * * * [whereas here] the INS misconduct

did inflict irrevocable damage on petitioner" (*ibid.*; emphasis in original). The court of appeals thus concluded that "the Supreme Court's conclusion that the government was not estopped in *Hansen* neither compels nor suggests the same conclusion here" (*ibid.*). Accordingly, the court ordered the INS to reconsider respondent's application for permanent resident status "under the same circumstances that would have existed had the INS acted within a reasonable time after receiving the visa petition" (*ibid.*).

Reasons for Denying the Writ.

The court of appeals has fully considered and correctly decided that the conduct of the Immigration and Naturalization Service's unexplained failure to act for a period of one and one-half years on the visa petition filed in behalf of the respondent and respondent's application for adjustment of status prior to the withdrawal of said visa petition following the breakup of respondent's marriage was affirmative misconduct by the Service, and, as such, operated to estop the government from denying the respondent the benefit of immediate relative status.

There is no conflict between the decision of the court of appeals in this case and the decisions of this Court. The historical approach was a rigid rule that estoppel would not be permitted against the government regardless how outrageous or shocking the misconduct of the government or the hardship suffered by the individual. Recently there has been a more enlightened balancing approach developing which measures the harm the individual suffers as compared to the damage to the public interest caused by the application of the estoppel doctrine against the government.

This Court has, without specifically labeling the remedy as estoppel, applied the principles of equitable estoppel, by

allowing an alien, who was statutorily debarred from becoming a United States citizen, be granted citizenship. The alien, in reliance on misinformation furnished to him by United States government officials, claimed an exemption from liability for military service under section 3(a) of the Selective Training and Service Act of 1940. This Act contained a proviso that one who claimed exemption as a neutral alien should thereafter be barred from becoming a citizen of the United States. Subsequently the court of appeals reversed an order of the district court admitting the alien to citizenship. This Court granted certiorari and reversed the court of appeals stating, "Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness." *Moser v. United States*, 341 U.S. 41, at 47 (1951). The Court prevented the government from denying the alien U.S. Citizenship even though he was statutorily ineligible for that status and the government was acting in its sovereign capacity by applying the principles of estoppel. "To do otherwise", the Court indicated, would violate notions of "elementary fairness." *United States v. Wharton*, 514 F.2d 406, at 411 (9th Cir. 1975).

There is no doubt that courts have been reluctant to invoke the remedy of equitable estoppel against government agencies. However, when the circumstances of a particular case warrant this extraordinary remedy to prevent a serious injustice caused by the government's misconduct and when the public interest will not be unduly damaged by invoking estoppel this Court has indicated such a remedy may be proper.

> "While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in *Montana v. Kennedy*, 366 U.S. 308, 314 (1961), no conduct of the

> sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government." *Immigration and Naturalization Service v. Hibi*, 414 U.S. 5, 8-9 (1973).

This Court's decision in *Hibi* set the standard which had to be met before the rule of estoppel could be invoked against the government in immigration cases by suggesting there must be "affirmative misconduct" on the part of the government. The Court found no estoppel in that case as it determined there had been no conduct by the government which would constitute "affirmative misconduct."

The petitioner relies heavily on the recent decision of this Court in *Schweiker v. Hansen*, 450 U.S. 785 (1981) for establishing the principle that an estoppel would never, under any circumstances, lie against the government. The question in that case was whether estoppel could be invoked against the Secretary of Health and Human Services to prevent the denial of retroactive social security benefits to a person who in reliance on erroneous information given to her by a government representative failed to file a written application for said benefits. The lower court conceded, and this Court found that the government representative's conduct was less than "affirmative misconduct." The Court merely stated in dicta that it has ". . . declined to decide whether even 'affirmative misconduct' would estop the government from denying citizenship, for in neither case was 'affirmative misconduct' involved, *INS v. Hibi*, 414 U.S. at 8-9 . . .; *Montana v. Kennedy*, 366 U.S. at 314-315, ..." Therefore, this case does not establish the principle that estoppel will not lie against the government when there

has been a finding of "affirmative misconduct" on the part of the government by a lower court. As such, there is not a direct conflict between the decisions of this Court and the court of appeals in the instant case.

The petitioner asserts there is no question whether, as a general matter, estoppel will lie against the government in the case of "affirmative misconduct" since respondent has made no such factual showing. This assertion ignores the fact that the lower court, after a review of facts in the instant case, has determined that the Immigration and Naturalization Service did engage in "affirmative misconduct." This Court has never defined what conduct on the part of the government would constitute "affirmative misconduct." It is likely this Court has not defined "affirmative misconduct" because it wisely recognizes the impossibility of setting forth a rigid definition as to what constitutes "affirmative misconduct." Certainly such a determination must be left to an inquiry into the facts of each case as it arises since such determination must necessarily turn on the actions of the parties involved.

The facts in the instant case are distinguishable from those cited in the *Hibi* case, *supra*. Hibi was an alien who contended the government should be estopped from denying him citizenship because the government had failed to publicize the availability of United States citizenship to a certain class of persons in the Philippine Islands and because the government had failed to continuously station naturalization examiners in the Philippines during the entire period of time the law allowed the granting of citizenship to that certain class of persons. Hibi did not assert his claim until twenty years after the time period statutorily ended. It can easily be seen that Hibi was not totally dependent on the government's action but could have utilized his own resources to achieve his desired goal. Had he exercised due diligence

and acted in a timely manner he could have possibly gained the citizenship status he desired. The Court found that the fact the government elected not to engage in an extensive publicity campaign and did not incur the expense of stationing government representatives in a foreign country was not "affirmative misconduct".

The instant case may also be factually distinguished from *Schweiker v. Hansen*, 450 U.S. 785 (1981). In that case a woman asserted that because a government representative had given her erroneous information and failed to instruct her to file a written claim, as was required by internal agency instructions, the government should have been estopped from denying her twelve months retroactive social security payments. We again see the factual pattern that the woman was not totally dependent upon the government for her information. The erroneous information given to her was given under chaotic circumstances and the failure to instruct her to file a written claim was due only to negligence on the part of the government representative. The woman was not precluded from exercising her own initiative in obtaining the information she needed as to the proper procedures to follow in advancing her claim. It is not even certain the woman had furnished the government representative with sufficient correct information for him to make a proper decision in her case. This Court found that the innocent error and simple negligence on the part of the government was not conduct which would constitute "affirmative misconduct."

In the instant case a visa petition with the necessary supporting documentation to classify Miranda as an "Immediate Relative" spouse of a United States Citizen was timely filed with the Immigration and Naturalization Service. Miranda, simultaneously properly filed an application for adjustment of status to a permanent resident with the Service.

Once he had accomplished these steps Miranda became totally dependent on the actions of the Service. The Service did not act upon either the visa petition or the application for adjustment of status for a period of eighteen months. The failure of the Service to timely adjudicate the applications in a timely manner was a violation of a statutory duty. "The INS has a statutory obligation to issue visas to qualified applicants to the full extent of the annual quota limits established by Congress. The legislative history of the Immigration and naturalization Act indicates that this duty has not been left to agency discretion, see S. Rep. No. 748, 89th Cong., 1st Sess. reprinted in [1965] U.S. Code Cong. & Ad. News pp. 3328, 3337-38, but is obligatory upon the agency." *Galvez v. Howerton*, 503 F.Supp. 35 at 38, 39 (1980).

Upon the breakup of Miranda's marriage and the withdrawal of the visa petition by his wife eighteen months after receipt of the application the government with amazing speed and efficiency (within less than 48 hours) was able to adjudicate Miranda's application for adjustment of status and write a denial opinion; prepare and issue a warrant of arrest for Miranda; prepare and issue an order to show cause why Miranda should not be deported; and schedule a deportation hearing. Within the next seven days the government had arrested and taken Mr. Miranda into custody. The government has never shown any justification for the unexplained eighteen month failure to act upon the applications. The government has belatedly asserted the delay was due to the need to conduct an investigation, presumably into the bona fides of Miranda's marriage. However, the government has never established that an investigation was ever conducted. The government has by innuendo attempted to create the impression that Mr. Miranda's marriage was a sham; however, not one piece of evidence has been offered

to establish there existed any fraud at the inception of Mr. Miranda's marriage or to cast doubt upon the bona fides of the marriage. Therefore, all such references should be disregarded. One can only wonder why the visa petition was not denied on its merits if the government had proof of a sham marriage rather than refuse to adjudicate the petition. The court of appeals held that the unexplained eighteen month failure, based on the government's conduct, was affirmative misconduct. It can be readily seen that Miranda was powerless to take further actions to obtain the permanent resident status to which he was entitled. He had acted in a timely and diligent manner. The eighteen month delay was the proximate cause of Miranda not being granted permanent resident status and his deportability was interdependent upon him being denied the permanent resident status.

It does not help petitioners to observe that the Court has not defined "affirmative misconduct" or that the Court has not *expressly* decided the question whether the government may be estopped when it has engaged in affirmative misconduct to the detriment of an individual. The fact that a given question has not been resolved by the Supreme Court has never been a recognized basis for the grant of certiorari.

Nor does the possibility that this issue might arise in some other case require resolution by the Supreme Court. The lower courts have recognized that to invoke the extraordinary remedy of equitable estoppel against the government there must be a threshold finding that the conduct complained of must constitute "affirmative misconduct". See, *Lee Yoo Fee v. Dulles*, 236 F.2d 885 (7th Cir. 1956) rev'd on other grounds, 355 U.S. 61 (1957); *Santiago v. INS*, 526 F.2d 488 (9th Cir. 1975) (en banc) cert. denied, 425 U.S. 971 (1976); *Corniel-Rodriguez v. INS*, 532 F.2d 301

(2d Cir. 1976); *Sun Il Yoo v. INS*, 534 F.2d 1325 (9th Cir. 1976).

While this court has never directly upheld estoppel against the government; it has never ruled that estoppel is an impermissible remedy when government conduct is sufficiently egregious to warrant such a remedy. No fewer than eight circuits have stated there are some circumstances in which the government will be estopped. *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2d Cir. 1976); *Walsonavich v. United States*, 335 F.2d 96 (3d Cir. 1964); *Tuck v. Finch*, 430 F.2d 1075 (4th Cir. 1970); *Simmons v. United States*, 308 F.2d 938, 945 (5th Cir. 1962); *United States v. Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1966); *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975); *Massaglia v. Commissioner*, 286 F.2d 258, 262 (10th Cir. 1961) (dictum); *Semaan v. Mumford*, 335 F.2d 704, 706 (D.C. Cir. 1964).

The factual inquiry as to whether affirmative misconduct has occurred is best left with the lower courts. These determinations must be made on a case by case basis. It is not sufficiently important to cause the Supreme Court to have to inquire de novo in each case. In the present case, petitioner raises only questions turning entirely on the facts of this case, already resolved in favor of the respondent, and without any impact outside the limits of this case. Certiorari, therefore should be denied.

Conclusion.

Since there is no conflict among the courts of appeals or this Court and the question presented in this case turns solely on the facts of this case there is not reason to grant the writ.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. RICHARDSON,

Attorney for Respondent.

APPENDIX.

Respondent is wrong in stating at page 2 of Respondent's Brief that the Application for Permanent Residence was denied on December 14, 1977, and that said application was denied subsequent to the issuance of the Order to Show Cause which was issued on December 7, 1977 (R. 79). There is an error in the transcript of record as to the date of the denial of petitioner's application for status as a permanent resident (R. 77). The transcript of record reflects the date of decision as being December 14, 1977; however, it should be noted the typewritten date has been obliterated and replaced at the upper and lower right side of the document with the date of "12-14-77" and the initials "M.H.F." (R. 77).

The decision to deny petitioner's application was rendered on December 5, 1977, as was stated in Petitioner's Brief at page 3. (Attached hereto is a copy of the original unaltered Immigration Form I-291, "Decision on Application for Status As Permanent Resident" reflecting the date of decision to the December 5, 1977, which is marked as petitioner's Exhibit "B".) Petitioner was not notified of this decision until December 14, 1979, the date he was arrested and taken into custody by Criminal Investigator Michael H. Flynn, of the Immigration and Naturalization Service as is noted on Order to Show Cause/Warrant of Arrest (R. 79A). Petitioner can only presume that Mr. Michael H. Flynn altered the date on the government's form I-291 to reflect the date it was served on petitioner rather than the date the District Director actually rendered his decision to deny petitioner's application for permanent residence (R. 77).